



Ohio Consumers' Counsel

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May 12, 2000

The Honorable Tom Bliley  
Chairman, Committee on Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, DC 20515

Dear Mr. Chairman:

I write to you in response to your recent request for response to your questions regarding my December 15 letter to you providing comments on H.R. 2944, the Electric Competition and Reliability Act. As you know, HR 2944 raises significant issues and concerns with respect to the development of an effectively competitive generation market and consumer protection.

I hope the attached set of responses is the level of detail for which you were hoping to receive.

Again, thank you for your interest in the perspective of Ohio's residential utility consumers. If you have any questions, or wish to further discuss this matter, please call Larry Frimerman at (614) 466-9557.

Sincerely,

Robert S. Tongren  
Ohio Consumers' Counsel

Enclosure

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## Responses to the Questions of Chairman Bliley by the Ohio Consumers' Counsel

1. *Many respondents on H.R. 2944 felt that the jurisdictional boundaries between Federal and State regulators needed further clarification. Could you please describe your understanding of the provisions resolving Federal/State jurisdictional issues and the respective jurisdictions of Federal and State regulators? If you believe they need to be modified, please provide specific legislative language.*

**Response to Question #1:** The jurisdictional issues related to transmission of electricity are the thorniest of all the issues to address. There is no magic bullet that would resolve the conflict. Increasingly, the electricity business is crossing state borders toward regional generation markets. This fact, coupled with the need for a consistent set of standards, protocols, and methods for operating the nationwide transmission grid to permit the functioning of wholesale and retail markets, points to federal jurisdiction for all transmission.

However, the rates to pay for transmission and the retail customers ultimately served by this nationwide grid are part of retail rates generally set by state regulators. Since individual retail customers have made the majority of the transmission investment, retail regulators should continue to play a role in how costs are allocated to the ultimate consumer, and the development of ways to provide adequate, reliable service to their state's retail customers. Yet, the goals of a state to protect its native load customers can sometimes run counter to the needs of an efficiently operating regional market. Any language crafted must recognize the legitimate role of states in protecting the rates of retail customers, while establishing prices, terms and conditions to foster development of a ubiquitous and comparable national transmission grid.

2. *Chairman Hoecker's comments on H.R. 2944 stated that "H.R. 2944 fails to adequately address the jurisdictional problem evidenced by the Eighth Circuit's recent holding in Northern State's Power Co. v. FERC...." Do you agree or disagree? How should Federal legislation address this issue?*

**Response to Question #2:** OCC believes that the transmission provisions in H.R. 2944 undercut non-discriminatory open access to the interstate grid--an element that is essential for a robust competitive market. This issue also is not crystal clear. For example, the approach would seemingly preempt the D.C. Circuit Court's finding regarding FERC's interpretation of the bundled/unbundled split.

Yet, the language codifies the recent 8th Circuit decision that severely limits the FERC's authority to ensure that all users of the transmission system receive the same service under the same terms and conditions [Title I, Section 102]. This could lead to balkanization of the interstate transmission grid. Retail customers served with rebundled services would not be included as native load, although the jurisdiction is unclear as to rates, terms, and conditions for rebundled services. Electric restructuring legislation could utilize the same approach as described in response #1 to address these problems.

3. *FERC issued Order 2000 urging the formation of voluntary Regional Transmission Organizations (RTOs) after Subcommittee action on H.R. 2944. What is your organization's position on that rule?*

**Response to Question #3:** OCC generally supports the rule as a good first step. However, we believe that FERC's reliance on voluntary action by utilities will prove to be unworkable. While the FERC may believe it has the authority to order participation, there are still industry participants who believe that it does not, and the ambiguity may have lead the agency to undercut its own interests in its most recent Order 2000. Thus, we support clarifying unambiguously that FERC has the authority to mandate participation in RTOs by utilities.

4. *Chairman Hoecker's comments on H.R. 2944 highlight that H.R. 2944 would limit FERC's authority to undertake the initiatives contained in Order 2000. Would you support modifying H.R. 2944 to make clear that FERC's Order 2000 could be implemented?*

**Response to Question #4:** Yes. This language should be modified.

5. *You listed market power concerns as being of great importance to you. Please outline, in further detail, what specific provisions are needed to address market power issues? Are there existing legislative approaches to the market power issue that you favor? Please provide specific legislative language on market power that you would like to see included in H.R. 2944.*

**Response to Question #5:** OCC supports language that would provide the FERC with specific authority to monitor the development of competitive markets; to eliminate undue concentrations of market power in any relevant market; and to remedy anti-competitive conduct or the abuse of market power. These powers should include the authority to order divestiture or other structural remedies when necessary. OCC urges Congress to prohibit cross-subsidization, adopt structural protections and authorize federal agencies to remedy abusive affiliate practices as they relate to interstate commerce or upon the request of state agencies. PUHCA contains certain protections for consumers and competitors that could be transferred to the FERC. This could also include the authority to order certain changes or prohibit certain corporate structures where there may be a means to facilitate anticompetitive or other actions that could ultimately harm consumers. In response to your query with respect to legislative language, we favor the relevant language in H.R. 1960, the Delay-Markey bill provisions.

Legislation should also clarify FERC's authority to review holding company to holding company and convergence mergers for their competitive implications and for disposition of generation assets. Finally, as mentioned below, OCC also supports language that specifically revises the FERC's merger standards to require a net benefit to consumers.

6. *Many respondents stated that antitrust laws alone are unwieldy and inadequate to deal with potential abuses of market power associated with rapid transformation of industry. Do you agree with that statement? If not, please explain?*

**Response to Question #6:** Yes. We would agree that antitrust laws, although useful, are not sufficient by themselves to guard against anticompetitive conduct in the utility industry. The

antitrust laws generally assume a competitive market and seek to guard against subversion of competition. This is a different situation than trying to create competition where there has previously been a monopoly. Markets do not transform themselves without structurally curbing the ability of incumbent monopolies to retain their dominance as competition is introduced.

7. *Most respondents have found the savings clause for State authority in the reliability provision of H.R. 2944 to be unnecessary and create the possibility of State action that could substantially impact reliability of bulk power system. Moreover, they state that the savings clause in Title II grants state commissions authority over transmission leading to balkanization of power grid and undermining the general recognition that greater regionalization of transmission is better for reliability. Do you agree or disagree? Please explain.*

**Response to Question #7.** Specifically, the language in HR 2944 does not protect a state's authority to protect consumers regarding reliability per se. I do not agree with the perspective that there is no need for a savings clause, because state commissions and consumer advocates will receive the calls directly from consumers if there is a power outage for whatever reason. States should have authority to secure adequate level of reliability, so long as the measures do not interfere with or weaken interstate commerce, do not contradict federal policy and are not greater than is necessary to address the reliability problem.

8. *In your letter, you highlighted the need for "strong, independent RTOs that separate generation and transmission control". What is your assessment of FERC's Order 2000 in this regard? What is your assessment of FERC's position that it has existing authority to mandate RTO participation?*

**Response to Question # 8:** While the Order is a useful first step, as we stated in #3, the FERC's reliance on voluntary action by utilities is likely to prove unworkable. The steps taken by the FERC in the Order are not likely to be sufficient to force transmission owners to surrender control of their transmission if they can delay and/or leverage the voluntary nature of the FERC's approach to weaken the restrictions to permit the exercise of strategic behavior and other subtle forms of market power. OCC agrees that the FERC has the authority, but the ambiguity mentioned in response #3 in and of itself provides reason to clarify that the FERC indeed has such authority.

9. *You saw "no need to incent transmission owners to do their jobs by providing adequate transmission to serve the nation." Proponents of incentive pricing argue that such pricing is necessary to attract needed capital investment in transmission assets. What steps can the Congress take to assure that necessary investment in the transmission system occurs?*

**Response to Question # 9:** Under existing regulation, owners of the transmission system have adequate incentive to provide sufficient transmission services to its customers. This is why there was no real transmission capacity shortfall prior to the onset of wholesale and retail competition laws. Since the introduction of competitive forces in the industry, two situations have arisen. On the one hand, there have been actual transmission constraints and bottlenecks identified. Second, some owners of transmission assets have recognized strategic value in maintaining transmission bottlenecks and load pockets. Some, as you noted, proposed to provide a greater incentive on the transmission side of the equation to remove this impediment. I believe that this approach is unwise,

and ultimately will not prove fruitful. This is a similar approach as that which failed with respect to utility demand side management and integrated resource planning in the 1980s. Basically the problem is twofold:

The incentive is not likely to be sufficient to reverse the countervailing benefits for companies to utilize their transmission to compete unfairly in generation markets.

The price one would have to pay to beat the high rates of return on other new investments for utilities is unlikely to be politically palatable or attainable, and may result in significant rate increases for no purpose other than to induce the utility to perform the function.

*10. H.R. 2944 contains provisions that grandfather State programs. Do you support those provisions? Please explain. How do the grandfathering provisions work in concert with the Federal/State jurisdictional boundaries drawn by the legislation?*

**Response to Question #10:** OCC supports grandfathering state laws permitting retail competition. However, the provision gives a blanket grandfather for three years after enactment. This is both unnecessary and impractical. Furthermore, any grandfathering provisions would need to be constructed in a way that does not impede federal policy facilitating open transmission and wholesale markets at a minimum. With respect to Ohio law, Ohio legislation explicitly recognizes FERC authority over transmission rates.

*11. Please elaborate on your position regarding language that revises FERC's merger standards to require a net benefit to consumers? Please provide legislative language that you could support on this issue.*

**Response to Question #11:** OCC supports language that specifically revises the FERC's merger standards to require a net benefit to consumers. In establishing its Merger Rule, the FERC relied on court cases that it posited limited the ability to order net benefits to consumers as a result of mergers. Mergers are undertaken to increase efficiencies, for strategic positioning, and for the expressed purpose of producing merger savings. Simply put, consumers have underwritten the utilities' regulated business, which is required to provide utility service on a least cost basis. If merging companies are not required to generate consumer savings or benefit as a result of the merger, then the action does not meet the least cost principles.

Legislation should also clarify FERC's authority to review holding company to holding company and convergence mergers for their competitive implications and for disposition of generation assets.

*12. Your letter supports linking repeal of PUHCA to the presence of structural protections designed to guard against market power abuse? Please provide legislative language you could support with respect to conditional PUHCA repeal.*

**Response to Question #12.** OCC would prefer the relevant language in the Delay-Markey bill, HR 1960. This language would condition waiver of certain PUHCA provisions as part of a comprehensive bill if holding companies are either subject to effective retail competition in every state in which they have a retail electric service territory or if they divest all of their generation. In

addition, the language provides the FERC with the authority to review affiliate transactions, provide state and federal access to books and records, and retain limitations on diversification.

13. *Your letter discusses the issue of "refunctionalization". Do you believe Federal legislation must address this issue? If so, please provide a specific legislative proposal.*

**Response to Question #13:** Refunctionalization is an issue only with respect to the blurring of the lines between transmission and distribution. Any action that shifts parts of a system from one jurisdiction to another by adjusting definitions should be done with the consent of both jurisdictions. Whether particular assets serve a transmission function or distribution function is a factual question that should be left up to regulators to determine.

14. *Your letter states that state commissions often are unable to review activities of utility affiliates in energy related enterprises targeting residential and commercial markets such as air conditioning? Why is there this inability by state commissions to review for cross-subsidization?*

**Response to Question #14:** Increased mergers in the industry mean that the holding companies that control various utility affiliates are increasingly out-of-state corporations. It is therefore difficult for a single state commission to command access to the necessary books and records of the holding company or its unregulated affiliates. Many state regulators lack the authority to review holding company transactions with unregulated affiliates. In addition, the state may have authority to review transactions between the operating utility and an affiliated company, but they may not be able to determine actual costs for unregulated affiliates. Moreover, many states lack the resources to do the in-depth review of transactions required to detect cross-subsidization between regulated and unregulated affiliates of a holding company.

15. *You stated that Federal legislation should remove any barrier to state implementation of net energy metering. Please, identify a few of those barriers?*

**Response to Question #15:** The net metering provision in HR 2944 is limited in scope and unnecessarily prohibits net energy payments to be made by utilities. It limits utilities' responsibility to compensate customers within the size limitation to no more than the customer would otherwise owe in a given month. Customers would not be required to be compensated for energy they contributed to the utility over and above their own usage. Some states would permit such compensation, thus the language in HR 2944 could also unnecessarily be preemptive.

16. *H.R. 2944 is silent with respect to privacy issues. What is the position of the Ohio Consumer's Counsel on privacy issues?*

**Response to Question #16:** Provisions in electric restructuring legislation should track that which is in the Telecommunications Act of 1996. For credit and other related information, the customer has to consent affirmatively in writing to permit companies to share such information. With respect to name, address and load data, this information should be available to marketers if available to utility generating subsidiaries unless the customer has signed a request denying permission.

17. *Do you support the development of uniform interconnection standards? If so, what should those standards be?*

**Response to Question #17:** Yes. There should be standards set for access to the transmission system, and for access to the distribution system. There should be a consensus by all stakeholders as to what the proposed standards should be. The Coalition on Uniform Business Rules, the CUBR-EEI process, the NARUC-DOE process, and the new GISB effort on electric standards could potentially be a mechanism for developing standards. NAERO could play a role in developing transmission interconnection standards. However, there are also many issues such as ancillary service, var support, backup power, voltage regulation, and rates, terms and conditions which should be addressed in a regulatory process.